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No. 09-1577

Supreme Court, U.S.
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In the

Supreme Court of the United States

MARK BAKER,

Petitioner,

v.

BOOZ ALLEN HAMILTON, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF OF PETITIONER

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REPLY TO BRIEF FOR RESPONDENT BOOZ ALLEN HAMILTON IN OPPOSITION

Petitioner, Mark Baker, submits this reply to the Brief in Opposition ("BIO) filed by Respondent.

I. Negligent Retention and Supervision Oversight of Employees by Federal Contractors Executing U.S. Foreign Policy Is a Major Problem for the United States For Grave Injury to Others Including Sexual Assault, Murder and Heinous Crimes Making the Question's Implications Far Reaching and Worthy of This Court's Review

The United States has a problem as U.S. foreign policy and military goals are increasingly contracted out to private Federal Contractors by the State Department through its U.S. Agency for International Development [US AID], and Department of Defense [DOD]. As U.S. military forces are reduced overseas, Federal Contractors are used to fill the gap and the U.S. government has neither sufficient personnel to monitor Federal Contractors nor funding to hire more oversight personnel in the present economy.[1] If private citizens effectively cannot sue for sexual assault and there are not enough federal oversight personnel, there is nothing to stop Federal Contractors' foreign operations from being no-man's land. A Federal contractor at U.S. Headquarters can ignore warnings by on-site supervisors in remote areas of danger of grave physical harm by an unfit employee and then

[1] The Commission on Wartime Contracting states that not enough oversight personnel from the U.S government for Contractors. National Public Radio [NPR] August 3, 2010 Grant Green, Bipartisan Commission on Wartime Contracting.

abnegate responsibility. As Federal Contractors execute more U.S. foreign policy and military objectives in harsh, sensitive and remote areas of the world, this problem will grow. Already, in Afghanistan Foreign Contractors viewed as abusive and overbearing caused President Karzai to sign a Decree on 8/17/10 requiring foreign private security contractors to disband by year end. U.S. officials worried that losing nearly 30,000 armed guards would hurt aid and development work. TIME, Vol. 176, No.9/2010.

Booz Allen Hamilton [BAH/Respondent] describes itself as a leading Federal Contractor management consulting firm. Petition at 5 (hereinafter Pet:5). BAH was the Federal Contractor for the US AID Project for Bankruptcy in Kazakhstan and Kyrgyzstan with Defense Base Act insurance for its employees and independent contractors from October 1, 1995 through September 30, 1996. The U.S. Defense Appropriations Act 2010, 123 Stat. 3409, § 8116(a)(1) and (2) applies to Federal [Defense] Contractors, their employees and independent contractors specifically providing that negligent retention and supervision for sexual assault cannot be waived by an employee or independent contractor as a term of employment for the sake of arbitration. Pet:2-3. The U.S. Supreme Court takes law as it finds it at the time of consideration of cases, Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc., 404 U.S. 412 (1972) Pet:13 including this Federal law.

The Fifth Circuit Court in Jones v. Halliburton, 583 F.3d. 228 (5th Cir. 2009) like the Fourth Circuit in this case involved Federal Contractor negligent retention and supervision for employee action

removed by Defendant to Federal Court for diversity. Both involved large, powerful Federal Contractors making huge profits as 'management consultants' that did not do what they were paid for by the Federal Government which was to manage. Both negligently retained and supervised employees that were reported from the field to be unfit and dangerous. The Fifth Circuit in Jones reasoned that being raped could not be considered part of the victim's job. However, the Fifth Circuit reasoned that this did not rule out that a court could consider the employees who committed the sexual assault could have been within their job because of violation of the ethics rules that applied to them as Halliburton employees. Jones at 237.

This case became more than an isolated case of domestic product or personal liability when the decision contravened Federal law, conflicted with other Circuit Court of Appeal jurisdictions and had major international ramifications on whether the U.S. can conduct foreign policy and military actions through Federal [Defense] Contractors for whom there is little Federal oversight. The Fourth Circuit opinion in this case allows Federal Contractors to abnegate responsibility for failure to manage by saying sexual assault or other heinous acts by its employees are extraordinary and they should be responsible only if the exact type of crime was noticed to be imminent. This case should help the Federal Government, the public and Federal Contractors to understand they should have ongoing procedures of contact with on-site supervisors and attend to the supervisors' warning that an employee has become unfit, capable of causing grave bodily

injury to others and should be removed back to the U.S.

II. Respondent's BIO Quoting Pittway Clearly Shows That There Is Division Among The Circuits Concerning Foreseeability of Grave Injury, Sexual Assault and Other Heinous Crimes

The Fourth Circuit rejected foreseeability for an employer for sexual assault by an employee in a remote land mainly based upon the Pittway Corp v. Collins, 973 A.2d 771 (Md. 2009) product liability case stating that there was an end to proximate cause where it would be highly extraordinary that the negligent conduct caused the harm. Pittway stated that 'foreseeability' is intended to reflect 'societal standards' of acceptable connection between the negligence and the ensuing harm.

> In applying the test of foreseeability...it is well to keep in mind that it is simply intended to reflect current societal standards with respect to an acceptable nexus between the negligent act and the ensuing harm, and to avoid the attachment of liability where,..., it appears "highly extraordinary" the negligent conduct should have brought about the harm. Pittway at 778, BIO:19

In rejecting Petitioner's argument, the Fourth Circuit effectively rejected the Fifth Circuit's application of 'societal standard' in the Jones case which acknowledged a heightened standard for Federal Contractor employees working and living in harsh, difficult remote places. Jones "noted that ...employees working under the Defense Base Act," ..., in remote places where there are severely limited

recreational and social activities, ... are in different circumstances from employees working at home. Jones at 238. Cf. O'Keefe v. Pan American World Airways, 338 F 2d 319, 322 (5th Cir. 1964). Further, Jones reasoned that "If non-Halliburton/KBR employees were allowed in the area where the alleged assault occurred, and Halliburton/KBR employees had assaulted such a non-employee, that person obviously would have and actionable claim. Id. 240. In Jones the Plaintiff victim reported the dangerous situation where she was placed in living quarters in a partition room with a gap from the top to the ceiling part of the men's area and the only women's bathroom access required walking through the men's rooms.

The Fourth Circuit considered foreseeability of sexual assault a public policy reason for rejecting employer responsibility which the Court deemed impossible except when the employee's behavior clearly and unmistakably threatened imminent criminal sexual assault to a particular person. The Fourth Circuit reasoned legal causation is a policy-oriented doctrine and the Fourth Circuit considered sexual assault such a highly extraordinary and unforeseeable crime that BAH's alleged tortuous negligent retention and supervision could not proximately cause Petitioner's injuries. Pet:A12-13. This was despite warnings from the on-site supervisor in the remote land that the employee put her, her 11 year old dependent son and others at risk of imminent grave bodily injury unless the employee was returned to the U.S. Nevertheless, the Court stated: 'Baker presented evidence that Davenport was far from a model employee, one capable of committing deplorable acts, including slapping

employees. Given his propensity for slapping employees and committing other unruly acts in the workplace, it was not objectively unreasonable for Baker to claim that Davenport suffered from emotional disorders and that said disorders proximately caused the sexual assault of Baker. Pet:A13.

A. Fourth Circuit Court Public Policy that Sexual Assault Is So Extraordinary That it Almost Always Precludes Federal Contractor Responsibility for its Employees in Harsh Overseas Working and Living Environment Is Erroneous

The Circuit Court discussed negligent retention responsibility elements indicating they were present. The Court made a public policy decision in the final stage of proximate cause, however, that societal standards are that sexual assault is so highly extraordinary and unforeseeable in all but the narrowest of cases it breaks the chain of proximate for employer responsibility. This contravenes the spirit of Federal Law specifically naming employer responsibility for sexual assault in negligent retention actions as a protected basis for civil litigation that a Federal [Defense] Contractor cannot require an employee to waive as a condition of employment even in the face of arbitration clauses highly favored under Federal law. This shows that sexual assault is not rare, unusual, extraordinary, and unforeseeable because it has happened enough that a Federal law has been written on the issue for Federal Contracts performed overseas.

The Fourth Circuit made public policy that societal standards made only specific notice of

imminent sexual assault (i.e. I am going to rape you now) supports negligent retention for sexual assault. Such notice is a physical impossibility in overseas harsh remote work and living environments where frequently the only contact with Federal Contractor US Headquarters is a call during U.S. business hours by the on-site supervisor half a world away and it defeats the purpose of the Federal law to preserve Federal Contractor responsibility. It also shows a clear conflict within the U.S. Appellate jurisdictions on whether recovery for sexual assault and negligent retention must be dealt with in the case of Federal contractors with employees overseas in high stress difficult work and quarters environment.

III. Petitioner's Factual Reply to Respondent's Continued Argument of the Facts

The Respondent argued the facts for which he should have filed a cross appeal challenging the 4th Circuit Court's findings. The standard for appealing finds of fact is very high. S. Ct. Rules 10(c) and 18.4. Petitioner's Reply to Respondent's continued argument of the facts is as follows. Petitioner said in deposition, "I don't think that there is any way that Booz Allen & Hamilton could have prevented this [rape] from occurring aside from sending Mr. Davenport home". JA:210, SJA:60 MB Dep Tr.248:10-249:12. Dependant Petitioner provisions were part of the Chief of Party's contract. He was BAH's Visa responsibility and an intimate part of the BAH Central Asia party. Pet: A22-24, JA69, 399. Petitioner was a normal, pleasant, precocious, child in the U.S. and Central Asia age 10-11 before he was raped. JA:482-3 Affidavits Surla and Zipman. Employees testified in deposition that he changed

dramatically for the worse after the rape in the second half of March 1996. JA:475,378.

Respondent knew about its employee because Respondent's June 2006 Request for Admissions [RFA] asked Petitioner to admit the assailant was its employee Davenport which Petitioner admitted. SJA433 RFA Answers 8/9/06.

The on-site Chief of Party supervisor told BAH the employee was in the middle of a divorce, was away from home an excessive period of time, and BAH needed to send him home to the U.S. before he committed grave bodily injury on her, her young dependant son or others. JA:458, JA:472, 473-5 Klouchnikov Affidavit. The employee's early March 1996 review said: he worked in a challenging, technically complex and harsh overseas environment; 2. he needed to develop his interpersonal and group support and coordination activities; 3. his flexibility and adaptability needed improvement; 4. he needed to gain a better understanding of superior-subordinate authority and support responsibilities; 5. [he had] a poor working relationship with his Chief-of-Party supervisor; and 5. he was overseas on assignment most of the ten months since his last review so that he could not complete BAH internal training needs scheduled for 1995-1996. Pet:A30-1, JA:496-500, JA:486-9.

The employee's Memorandum of Understanding [MOU] Overseas Assignment contract was for full time work on the US AID Bankruptcy Project in Kazakhstan and Kyrgyzstan from October 1, 1995 to September 30, 1996 JA:434, the same time as for the Chief of Party. JA:69. His hours in the Bankruptcy Project were reduced and replaced by another and he

was reassigned to other projects in early 1996. He was kept in Kazakhstan and Kyrgyzstan until he was returned home at the end of June 1996 before the projected September 1996 end of the Bankruptcy Project which continued overseas through November 1996 and was not renewed. The employee was a senior associate in 1995 and was still a senior associate as of his deposition in 6/28/07. JA:77 Davenport Tr Dep 6/2707; JA:107 BAH Rep Kirsch 6/8/07. The employee in his 1995 February 1996 self-assessments parts of his reviews showed his great upset.[2] Pet: A27-30.

IV. This Case Is An Excellent Vehicle for Giving Federal Rule of Civil Procedure [FRCP] 44.1 Proof of Law Guidance in the Expanding Global Markets and Political Arena Where Federal Contractors Execute U.S. Government Foreign Policy and Military Actions

This case concerning foreign law application to Federal Contractors is important to give guidance to Federal Contracting under [FRCP] Rule 44.1 where

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[2] Respondent refused to produce the employee's reviews, self-assessment and other documents until ordered and only produced them after several court orders, on 10/23/07 just before Petitioner's Opposition to Respondent's Summary Judgment Motion was due on 11/1/07 JA:11. By then it was too late for further deposition of the employee (deposition 6/28/07) or BAH representative Kirsch (deposition 6/8/07) who signed BAH's 2007 discovery production and reviewed the employee and his self-assessments for 1995 and 1996. Kirsch also stayed at the senior associate level from 1995 to 2007. Petitioner preserved the issue of producing employee records in deposition and the June 29, 2007 Status Report at close of discovery. JA:8 Petitioner continued to press for the employee's file through motions to compel which the court granted. JA:8-10.

foreign law does not offend U.S. public policy. Petitioner met proof of law standards for Kyrgyz law under Maryland lex loci delicti applying the law of the place where the tort occurred. Kyrgyz law at the time of the rape allowed the victim's civil case for employer responsibility for its employee's rape of Petitioner (then eleven) regardless of whether a criminal case had been brought or won. Kyrgyz law even expanded Petitioner's access to medical injury compensation as a child victim because it provided for recompense without relation to parental responsibility for such expenses.

That FRCP 44.1 standards for Proof of Law allow Petitioner's use of Kyrgyz law was presented on Appeal in Petitioner's Appellate Reply. Earlier Respondent misrepresented Kyrgyz law in its Declaration that cited now defunct Former Soviet Union statutes written in the 1960's and did not produce the cited law itself. Declarant's expert opinion was further flawed because it applied purported foreign law to the Amended Complaint facts to assert the case was procedurally barred rather than merely giving information to help the court determine the content of the applicable foreign law of Kyrgyzstan[3]. Respondent's Declaration incorrectly stated that unless the employer ordered the employee to rape the 11 year old dependant and a Kyrgyzstan Court criminally convicted the rapist, Petitioner would not be allowed to bring a civil case. This misrepresentation of Kyrgyz law skewed Plaintiff's opening appellate brief because such Kyrgyz law would be against Maryland public policy

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[3] See Minebea Co., Ltd v. Papst, 444 F. Supp. 2d 68, dismissed, 224 Fed. Appx. 962, 2007 WL 1492272 (D.D.C. 2006)

to allow a cause of action where foreign law was so harsh and far from U.S. standards[4]. It took over a year to secure the actual Kyrgyz Law the Declaration cited to show that Respondent's Declaration could not be further from the truth which Petitioner reported and argued in his Appeal Reply which produced the laws cited in the official Russian language and English translation.[5]

Cases interpreting FRCP 44.1 apply to the issues at hand. A party's foreign law notice acts as notice for both parties allowing evidence from both at varying stages.[6] Proof can be given at the Appellate stage[7] most particularly when there is a good reason[8]. A Court of Appeals exercises plenary review and it is not confined to information available to or considered by the district court.[9] Law in effect at the time of injury controls[10] If a Declarant foreign law expert quotes now defunct law of her country, she should have a copy of the law to read before she

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[4] Films by Jove, Inc. v Berov, 250 F. Supp. 2d 156 (2003), motion to vacate denied, 341 F. Supp 2d 199 (2004).

[5] Reply Appendix Translated Certified Am. Trans. Assoc. Translators. Respondent not contending error Court assume correct. Forzley v. AVCO Corp. Electronics Div., 826 F.2d 974, (11th Cir. 1987)

[6] FRCP 44.1 Advisory Committee Notes 1966 Adoption

[7] Stuart v. U.S., 813 F.2d 243, certiorari granted, 108 S. Ct. 1592, 485 U.S. 1033, 99 L. Ed. 2d 907, reversed on other grounds, 109 S. Ct. 1183, 489 U.S. 353, 103 L. Ed. 2d 388, on remand 872 F.2d 929 (9th Cir. 1987).).

[8] Infra FN6.

[9] Grupo Protexa, S.A. v. All American Marine Slip, a Div of Marine Office of America Corp., 20 F.3d 1224 (1994) rehearing and rehearing in banc denied, cert. den., 115 S. Ct. 481, 513 U.S. 986, 130 L. Ed. 2d 395 (1994)

[10] Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.L., 422 F. Supp. 405 (N.D. Ill. 1976)

gives her opinion on it and should include it with her Declaration as is considered normal[11]. Without a copy of the law Petitioner could not comment but to say the Declaration on its merits was inadequate proof of law. In the West the ability to obtain a defunct law from the remote defunct Kyrgyz Soviet Socialist Republic of the defunct Former Soviet Union [Union of Soviet Socialist Republics (USSR)] written fifty years ago under the 1936 USSR Constitution is extraordinarily difficult. After searching for over a year, Petitioner finally obtained the law from the U.S. Library of Congress, and the Assistant Director of the Law Library who speaks Russian verified it. Petitioner submits this is good cause.

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[11] U.S. v. Pre-Columbian Artifacts, 845 F. Supp. 544 (N.D. Ill. 1993).

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Baker's petition for writ of certiorari, the Court should grant the writ of certiorari.

Date: September 9, 2010

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REPLY APPENDIX
KYRGYZ LAW

The Law Verified by Library of Congress in Russian Pet A35-36; Trans A Pet A-32, 35 Criminal Law

Article 112. Pederasty (Sodomy)

Pederasty is punished by imprisonment for a period up to two years.

Pederasty committed using violence or in relation to a minor or where the victim is a dependent is punished by imprisonment for a period of from two to six years.

Criminal Procedure

Article 135. Filing of a Civil Action

1. A person who has suffered harm from a crime or an act by an insane person which is forbidden by the Criminal Code of the Kyrgyz Republic, or his representative has a right to bring a civil case at the same time as the criminal case but not after the beginning of the legal hearing.

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3. A PERSON WHO HAS NOT FILED A CIVIL ACTION DURING A CRIMINAL PROCESS, BUT HAS NOT HAD THE ACTION EXAMINED BY A COURT, HAS THE RIGHT TO FILE A CIVIL CASE.

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Civil Procedure

Article 65 Basis for Releasing the Need for Further Proof

1. Facts recognized by the Court as well known are not required to be proved.

2. A Court is required to adopt decisions by a court in an earlier civil case, they are not to be argued again and they are not subject to challenge during the litigation of the later civil action in which the same people are parties.

3. A Court trying a case about the civil and legal consequences of the actions of a person sentenced by a court in a criminal case must accept the criminal verdict as proof that the illegal actions causing a criminal conviction were committed by the defendant.

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Respondent's Declaration without production of the law

9. In the Kyrgyz Republic, the civil courts will not examine a claim for damages for buggery (defined as sodomy) unless the fact of buggery has been established in a criminal procedure by means of: (i) a ruling of a court; and (ii) a court sentence. See **Art. 112, Criminal Code of the Kyrgyz SSR (1996)**, constituted by the Law of the Kyrgyz SSR (dated Dec. 29, 1960), expired pursuant to the Law of the Kyrgyz Rep. #69 (dated, Oct. 1997); see also **Art. 135 Criminal Procedure Code of the Kyrgyz Rep.** (dated June 30, 1999); **Clause 3, Art 65, Civil Procedure Code of Kyrgyz Republic** #146 (dated, Dec. 29, 1999).

Civil Code Sections454,455, 465 etc
Law Library of Congress Verified

OBLIGATIONS ARISING AS A CONSEQUENCE OF CAUSING HARM

Article 454 General basis for liability for harm caused

Harm caused to the person or property of a citizen or harm caused to an organization shall be made in good in full measure by the person causing the harm.,,, Translated by Paul W. Merriam, American Translator's Association Certified Translator, Russian to English August 4, 2008 add resp 30-32

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Article 455 Responsibility of an organization for harm caused through the fault of its workers

An organization must compensate harm which is caused through the fault of its workers during the fulfillment by them of their work (service) responsibilities.

Article 464 Responsibility for harm caused by a source of increased danger

Organizations and citizens, whose activity cause increased danger to others ...are obligated to compensate harm which is caused by the source of increased danger ....

Article 465 Responsibility for Harm Jointly Caused by Several Persons

Persons, who have caused harm jointly bear joint and several liability for the losses (casualties).

Article 475. Compensation for Harm to the Health of a Citizen Who Has Not Reached 15 Years of Age

In the case of damage to a citizen's health who has not reached fifteen years of age and who has no income, the organization or citizen who is responsible for the harm is obligated to compensate expenses connected with the harm to the victim's health.....

Respondent's Declaration without production of the law

¶4.I have reviewed the Amended Complaint....I...make the following statements with respect to the application of the law of the Kyrgyz Republic to the claims set forth in the Amended Complaint.

¶7.[A] legal entity shall be responsible for its employee's action or inactions, if that employee has caused harm to third parties in the course of performance of his or her employment obligations. Art. 455 Civ. Code of the Kyrgyz SSR (1996), constituted by the Law of the Kyrgyz SSR #351-YI (dated, July 30, 1964) expired pursuant to the Law of the Kyrgyz Rep. #2 (dated Jan. 5, 1998)

¶8.Even if an employee were to cause harm to a third party in the course of performance by that employee of his or her employment obligations, an employer shall not be liable for its employee's action or inactions unless the predicate act, which must have resulted in criminal sanctions, was completed upon the employer's order and control. Art 455 Civ. Code of Kyrgyz SSR (1996) Id.

Learned Treatise, Professor Chris Osakwe. Pet A-39-40 An Examination of the Modern Soviet Law of Torts, 5 Tul. L. Rev. 3 (1979) presently Professor of Law at Moscow University.

[T]his study attempts to bring together in one comprehensive piece Soviet statutory law, case law, and doctrine dealing with all aspects of the contemporary Soviet law of torts. ... Pet A-38-39

A composite picture of the modern Soviet law of vicarious tort liability ... First, the employer is vicariously liable for the tort (based on intent, negligence, or strict liability) committed by its employee in the scope of his employment. Second, the employer, for purposes of vicarious tort liability may be a physical or juridical person. Third, the determination of what constitutes "acting in the scope of employment" must be made on a case by case basis. In making its determination, the fact finder must consider the nature of the business, the accepted custom among those who engage in such business, and any other relevant factors...Fourth, if it is determined that the employee had abandoned the master's business when the tort occurred, the master may still be held liable if it is shown that the employer was negligent in the selection of the employee or that the employee violated a non-delegable duty. Fifth, any tort committed by an employee on the premises of the employer's business or at any other place where the employee customarily works is presumed to have been committed within the scope of the employment, and consequently, the employer is vicariously liable...

Respondent's Declaration opinion on facts without production of the law

¶4 I have reviewed the Amended Complaint...I ...make the following statements with respect to the application of the law of the Kyrgyz Republic to the claims set forth in the Amended Complaint.

¶10. The allegations of the Amended Complaint do not indicate that buggery has been established by the required criminal procedures identified in Paragraph 9. Pet A-42

¶11. In sum, the legislation of the Kyrgyz Republic as of 1996 contains provisions, according to which, an employer is only liable for damages caused by its employee to a third part only in the course of performance by such employee of his/her employment obligations or official duties an employer cannot be held responsible for a criminal act (i.e., buggery) committed by the employee, unless the ct is completed following the order of the employer and under the employer's control. Thus, Booz Allen Hamilton Inc. cannot be held liable for the facts alleged in the Amended Complaint. Pet A-42-43

Baker v Booz Allen Hamilton Fourth Circuit Court Opinion Pet A:12-13

"Once causation-in-fact is established, the proximate cause inquiry turns to whether the defendant's negligent actions constitute a legally cognizable cause of the plaintiff's injuries. This part of the causation analysis requires us to consider whether the actual harm to the plaintiff falls within a general field of danger that the defendant should have anticipated or expected. Stone v. Chicago Title

Ins. Of Md., 624 A.2d 496, 500 (Md. 1993). Legal causation is a policy-oriented doctrine designed to be a method for limiting liability after cause-in-fact has been established. Pittway, 973 A.2d at 787. The question of legal causation most often involved a determination of whether the injuries were a foreseeable result of the defendant's negligent conduct. Id. at 788 Other public policy considerations that may play a role in determining legal causation include the remoteness of the plaintiff's injury from the defendant's negligence and the extent to which the injury is out of proportion to the defendant's culpability. Id.

In our view, the injury in this case (Sexual assault) simply was not a reasonably foreseeable injury arising from the alleged negligent hiring, retention, and/or supervision of Davenport. The injury suffered by Baker was criminal sexual assault. Baker argues that this sexual assault was a foreseeable result of Davenport's "explosive behavior in the workplace. We disagree. Without question, Davenport's demeanor at work was offensive. Slapping fellow employees is deplorable. However, BAH reasonably can assume that an employee who has slapped fellow employees on occasion will not sexually assault the child of an independent contractor of BAH. Therefore, BAH could not reasonably anticipate that Davenport's behavior was an inevitable prelude to sexual assault if his actions did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a victim. Slapping a fellow employee simply does not inexorably lead to criminal sexual assault.